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November 26, 1996

BY HAND

Michael Goodstein, Esq.
U.S. Department of Justice
Environmental Enforcement Section
1425 New York Ave., N.W.
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Dear Mike:

Pursuant to your suggestion, I am attaching a list of questions that ASARCO has regarding the practicality of application of 40 C.F.R. § 266.112 to its East Helena smelter. As we have discussed, answers to these questions will have vital bearing on the Company's decision whether to seek a RCRA permit at East Helena.

Please let me know how you would like to facilitate continued dialogue on these important questions and with respect to the "acceptance criteria" that we submitted earlier this month.

Sincerely,

John T. Smith II

Attachment

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QUESTIONS REGARDING EPA's "SLAG TEST

Slag generated by a primary lead processing facility such as ASARCO's East Helena custom lead smelter is exempt from regulation as hazardous waste under RCRA. See 40 CFR § 261.4(b)(7)(ii). ASARCO is considering whether to apply for a permit under RCRA that would allow it to accept and store hazardous wastes and process them at its East Helena, Montana facility for recovery of metals. The East Helena facility can only accept and process hazardous waste if its slag will continue to be exempt from RCRA. EPA has prescribed criteria under which a primary lead smelter may process hazardous waste and still retain exemption for its slag: it must continue to process at least 50% by weight normal, nonhazardous raw materials; and (2) it must demonstrate that processing of hazardous waste "does not significantly affect" its slag. 40 CFR § 266.112(a)(2) & (b).

EPA has advised that, because East Helena's slag normally exhibits the toxicity characteristic (TC) for lead, the facility cannot use health-based limits pursuant to Section 266.112(b)(2). Rather, EPA insists that the facility employ the statistically-based comparison of its waste-derived residue with normal residue set forth in section 266.112(b)(1) and Appendix IX to part 266. ASARCO has expressed concern about the feasibility of applying this test to the slag produced by its operations at East Helena. EPA believes that ASARCO's concerns may not be warranted and has offered to answer ASARCO's questions about the appropriate interpretation and application of this test at the East Helena smelter. In an initial response to EPA's suggestion, ASARCO seeks answers to the following questions:

1. To what Appendix VIII constituents must the statistical comparison apply? The regulations state that it must apply to all part 261, Appendix VIII constituents "that could reasonably be attributable to the hazardous waste." Presumably, at ASARCO's primary lead smelter, the focus would be on metal constituents, since it would be accepting metal-bearing waste for metal recovery purposes. Yet, most or all of the facility's non-waste feed stocks contain Appendix VIII metals. It is difficult to determine which, if any, of the Appendix VIII metals should be deemed "reasonably attributable" to the hazardous waste, as distinct from nonhazardous feed stocks. Is EPA essentially referring to the metals that it has listed in Appendix VII to part 266? Must ASARCO be concerned with metals that are present at "non-

detect values," i.e., below the lowest concentration for which SW-846 analytical methods are valid?

2. How would EPA recommend developing information about "normal residue" at ASARCO's East Helena plant, given the fact that its nonhazardous waste feeds number in the hundreds and change from day to day and week to week? Although the rules and Appendix IX to part 266 call for development of a "normal residue" profile based upon a minimum of ten days of sampling, it may be virtually impossible even with a much higher number of samples to establish a representative "normal residue" profile for East Helena. The result may be that "statistically significant" changes in the residue when processing hazardous waste may reflect changes in composition of the non-waste feed stocks, and not the processing of wastes. This problem is compounded by the fact that changes in the feeds to the smelter, whether waste or non-waste, may not manifest themselves in the slag until considerably after the time they are charged to the smelter. For instance, metals may first be captured in baghouse dust and ultimately appear in the slag after the dust is recharged to the smelter.

3. What are the immediate practical consequences of an apparent "failure" of the "slag test"? ASARCO's East Helena facility generates thousands of tons of slag a day. It would not be tolerable for ASARCO to lose exempt status for a portion of its slag pile simply on the basis of a single statistical comparison. ASARCO's concerns are compounded by the fact that the test is designed in a way that on any single comparison, there is a 5% chance of a "false positive." If the comparison must be made for as many 10 metals, there is an increased chance of a false positive, with the prospects ranging as high as 40%.

4. Must the "slag test" be applied when the East Helena smelter processes any and all types of hazardous waste? What about smelting of materials such as personal protective equipment, respirator cartridges, baghouse bags, etc. as identified in Appendix XI to part 266? Also, must the slag test apply if the smelter is only receiving hazardous wastes that are being recycled for precious metal recovery pursuant to § 266.70 and § 266.100(f)?

5. How frequently must ASARCO analyze its slag? The rules state that the statistically-derived concentrations for the normal residue must be reestablished when there are changes in raw materials that would likely reduce concentrations of toxic constituents. The rules also state that the waste-derived residue must be sampled and analyzed "as often as necessary" to determine whether the residue generated "during each 24 hour period" contains toxic constituent concentrations in excess of the normal residue. As discussed above, the nature of ASARCO's operations are such

that its normal non-waste feeds may change frequently. ASARCO does not yet know what range of hazardous wastes it may accept.

6. How can ASARCO account for slag variability that may result from variation in operating conditions in its smelting furnace? Small changes in operating conditions in the furnace may have discernable effects on the composition of the slag, even if these changes have nothing to do with the nature of materials fed to furnace for metals recovery. If ASARCO determines that elevated metals in a slag test are likely a result of such fluctuations in operating conditions, is it entitled to conduct a retest before it must determine that its slag may no longer qualify for exclusion?

7. Has EPA issued guidance regarding the proper treatment of "non-detect values" in carrying out the statistical test for slags? Appendix IX to part 266, issued in 1991, states that EPA "is developing guidance" on this subject. ASARCO needs such guidance if it is to understand the practicalities of application of the test to its complex operation.

8. Finally, and most importantly, what is a "significant" effect on residue for purposes of the statistical test? The general standard of § 266.112(b) requires the owner or operator to demonstrate that processing of hazardous waste "does not significantly affect the residue" under either the statistical or the health-based approach. Under the health-based limits of § 266.112(b)(2), a "significant" effect is one that causes the residue to exceed prescribed levels -- for any "TC" metal the level is the characteristic level. In contrast, the part 266 Appendix VII statistical test seems to equate "significant" effect with a statistically significant change in constituent levels in the residue from processing of wastes, without regard to the human health or environmental importance of such a change. ASARCO submits that the statistical test should be interpreted to require not only a statistically significant change in composition but also a determination that this change is significant from the standpoint of protection of human health and the environment. Thus, a statistically significant change in the composition of the slag for a metal constituent that does not cause the slag to exceed the Appendix VII health-based limits for that constituent should not disqualify the slag for continued exclusion.

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